United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

WILLIAM J. MERINGOLA,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
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No. 77-1351

UNITED STATES OF AMERICA,

Appellee

v.

WILLIAM J. MERINGOLA,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Whether the trial court's closing instructions relating to several of defense counsel's arguments during summation improperly implied misconduct by defense counsel and thereby denied appellant impartial consideration of the evidence by the jury.

2. Whether the trial court's closing instructions avoided a partisan summary of the evidence.

3. Whether the court erred in failing to instruct the jury that witnesses' prior inconsistent statements may be considered

for impeachment purposes.

STATUTES INVOLVED

18 U.S.C. 659 provides in pertinent part:

> Whoever...steals, or unlawfully takes, carries away,...any...motor-truck, or other vehicle... with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property;
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> * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both;
>
> * * *
>
> To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be *prima facie* evidence of the place from which and to which such shipment was made.

STATEMENT

1. Following a jury trial in the United States District Court for the Western District of New York, appellant was convicted of the theft of goods from an interstate shipment, in violation of 18 U.S.C. 659 and 2 (Counts II, III, IV) and conspiracy, in violation of 18 U.S.C. 371 (Count I). He was sentenced to [illegible] years' imprisonment on each count to be served concurrently.

2. Appellant's convictions result from his criminal association with Elwood Weber, Terry Weber, and Michael Lafferty[1/] in March and April, 1975, during which time shipments of food products with a wholesale value of approximately $56,700 were stolen from interstate commerce.[2/]

The first theft took place in the early morning hours of March 1, 1975. Several hours before the theft appellant met Elwood Weber in Geneva, New York; appellant stated that he could dispose of stolen spaghetti sauce or sugar and instructed Weber to contact him if he acquired these items (Tr. 240-241, 243, 621-623).[3/] Thereafter Elwood and Terry Weber drove in a truck tractor to a truck stop in Rochester where they observed two trailers which they believed were loaded with spaghetti sauce. After waiting

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1/ Elwood Weber, Terry Weber, and Lafferty were named as unindicted co-conspirators.

2/ The indictment charged that $12,952 worth of spaghetti sauce was stolen on March 1, 1975 (Count II), that $18,312 worth of sugar was stolen on March 15, 1975 (Count III), and that $25,449 worth of cooking sauce was stolen on April 26, 1975 (Count IV). All of the goods were moving in interstate commerce. Thus, the stolen shipment involved in Count IV was en route to retail dealers in Maryland and Pennsylvania (Tr. 334-340) while the shipment involved in Count III had arrived in New York after passing through Pennsyvania and New Jersey (Tr. 94). Although the points of origin and destination for the shipment involved in Count II were within the State of New York, it was to be routed through Pennsylvania and New Jersey (Tr. 34-37) and thus constituted an interstate shipment for purposes of the statute. United States v. Berger, 338 F.2d 485 (2nd Cir. 1964), cert. den. 380 U.S. 923.

3/ "Tr." refers to the six-volume transcript of appellant's trial.

approximately two hours for business at the truck stop to subside, the Webers opened one of the trucks and discovered a shipment of Ragu spaghetti sauce. They immediately attached their tractor to the trailer and drove it from the truck stop to a highway service area where Elwood Weber telephoned appellant (Tr. 244-246, 623-626).

At appellant's instruction the Webers took the trailer to a truck parking area near Geneva (Tr. 246-250, 626-629). After parking the trailer, Elwood Weber telephoned appellant and made arrangements to meet him at a doughnut shop in Geneva (Tr. 250-254, 629-633). At this meeting, appellant told the Webers to move the trailer from the parking lot to the Mohawk Fruitstand in Binghamton and they did so (Tr. 255-258, 633-638). Appellant met them at the fruitstand and gave them final instructions to deliver the stolen Ragu spaghetti sauce to Norman's Warehouse, a supermarket adjoining Polar Foods, a food warehouse in Binghamton. Appellant then led them to Norman's Warehouse and the Webers remained there while the trailer was unloaded (Tr. 135-136, 258-259, 276, 638-639). Later, appellant rejoined the Webers at the Mohawk Fruitstand where he paid them $1,000 which they divided equally (Tr. 259-260, 639-641). Subsequently, a large portion of the stolen Rague sauce was recovered at Norman's Warehouse and Norman's Market, two supermarkets operated by the owner of Polar Foods (Tr. 209-210, 212-216).

In mid-March, 1975, appellant again met Elwood Weber in Geneva and suggested that Weber attempt to steal a load of sugar

from Beverage Transport Company, a trucking firm in Fort Gibson, New York (Tr. 261-262, 644-646). On March 15, 1975, Elwood Weber and his brother Terry drove to Beverage Transport Company in Elwood Weber's tractor. Upon entering the parking area, they discovered a trailer filled with five-pound bags of sugar, attached their tractor to the trailer and pulled it from the premises (Tr. 262-263, 647-648). Elwood Weber subsequently telephoned appellant who directed him to drive toward Binghamton. Appellant stopped the truck en route and asked to inspect a sample of the sugar. Taking a five-pound bag to his automobile, appellant held a brief discussion with an unidentified passenger. He then told the Webers that he could dispose of the sugar and directed them to deliver it to the Mohawk Fruitstand (Tr. 263-265, 649-652).

Appellant met them at the fruitstand, but indicated that he was having difficulty disposing of the sugar. After waiting approximately two hours, appellant told the Webers to unhook their tractor and leave the trailer at the fruitstand (Tr. 265-266, 652-654). Later that morning, the trailer was transported to the Polar Foods warehouse and unloaded (Tr. 135-139, 178-181, 184-187). Appellant then told Elwood Weber that he had sold the sugar and directed Weber to meet him at the Ithaca bus station. At the meeting appellant gave Weber $1,000 for the sugar (Tr. 266, 655-657). A large portion of the stolen sugar was subsequently recovered from the same premises where officers recovered the spaghetti sauce

stolen on March 1 (Tr. 209-212, 217-218).

On April 25, 1975, appellant met Elwood Weber in Geneva and agreed to steal another food shipment. Following an unsuccessful attempt to recruit Terry Weber to join them in the theft, appellant and Elwood Weber drove to a restaurant in Geneva where they were joined by Michael Lafferty, a friend who Elwood Weber had selected to replace his brother (Tr. 489-490, 660-663). The three men then drove in appellant's automobile to Denny Truck Lines in Webster, New York. While appellant waited in a diner across the street, Elwood Weber and Lafferty broke into several trailers parked in Denny's lot. They discovered two trucks loaded with Ragu cooking sauce and removed a sample for appellant's inspection (Tr. 493-496, 665, 667-670). After examining the sauce and making several telephone calls, appellant directed Weber and Lafferty to steal the trucks and drive toward Syracuse. Appellant said that he would rejoin them at a designated point en route (Tr. 496-497, 672-673). As instructed Weber and Lafferty returned to Denny's lot, stole the two tractors and trailers and drove toward Syracuse, stopping once to remove the signs from the trailers and again to receive appellant's further instructions to deliver the trucks to a parking lot near Syracuse (Tr. 498-500, 674-677).

When they reached Savannah, New York, Weber's truck ran out of fuel. During an unsuccessful effort to transfer fuel from Lafferty's truck, Weber received a ticket from State Police officers

for failing to carry a required log book in his vehicle (Tr. 370-373, 398-401, 501-502, 678-683). When the officers departed, the two men continued toward Syracuse in Lafferty's truck and eventually delivered the trailer to the parking lot specified by appellant. Unwilling to remain near the stolen trailer, they proceeded in the tractor to another parking area where Weber telephoned his brother Terry and asked him to meet them in a nearby town. Weber and Lafferty then hid the tractor near the designated meeting place and returned in Terry Weber's automobile to the disabled truck in Savannah from which they attempted to remove their fingerprints (Tr. 503-506, 678-687). Terry Weber then drove them to Geneva whereupon Elwood Weber left for St. Louis. After reporting to appellant the problems which he and Elwood Weber had encountered, Lafferty himself departed for Louisiana (Tr. 507-508, 687-688).

ARGUMENT

I

IT WAS PROPER FOR THE TRIAL COURT IN ITS JURY INSTRUCTIONS TO COMMENT ON SEVERAL OF DEFENSE COUNSEL'S ARGUMENTS DURING SUMMATION WHICH WERE MISLEADING

During his summation defense counsel made a series of arguments in which he questioned whether it was necessary for the government to introduce detailed evidence about each element of the offenses, since the defense had not contested certain elements; intimated that the government had not called a witness whose testimony would be favorable to the defense, even though defense counsel was aware that the witness had indicated in a bench conference that he would invoke his Fifth Amendment privilege; and questioned why the government had not introduced a tape recording between appellant and an informant, despite the fact that the trial court had previously ruled that the recording was inaudible and, hence, inadmissible. In response to these arguments, the court in its instructions to the jury briefly corrected the misimpressions created by defense counsel. Appellant contends that the trial court's corrective instructions improperly implied misconduct by defense counsel and thereby denied appellant fair consideration of the evidence by an impartial jury. However, as we show below, the court's charge was a proper and carefully calculated response to a series of misleading defense arguments, and in no way impugned the integrity of defense counsel or denied appellant a fair trial.

1. During closing argument, defense counsel noted that although the defense had conceded that the four shipments charged in the indictment had been stolen by the Webers and Lafferty, the government nevertheless introduced substantial evidence to establish the theft, value, and interstate character of the shipments. Counsel then suggested that the government offered proof of these allegedly conceded issues in order to strengthen a weak case with impressive documentary evidence.[4/] In its closing instructions, the court recalled defense counsel's statement that the government need not have introduced evidence to establish the thefts, the value of the goods stolen or their interstate character, because those issues were not in dispute. It then informed the jury that these were necessary elements of the offenses charged which the government had the burden of establishing beyond a reasonable doubt by testimentary and documentary evidence or by a stipulation to those elements between the parties. However, since no stipulation was introduced, the court stated that the government's

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2/ Defense counsel argued that the government "waste[d] so much time proving all of these things that there never were any issue about and that were conceded at the beginning" so that it could

> get [the jury] ensnarled in all of these papers and these Exhibits and these photographs and these bills of lading and this question of what is coming from where and here and there and assume that there was some sort of massive case built here by the prosecutor as against the defendant.
>
> The case is no stronger than the Webers and Lafferty. (App. A24).

proof of the theft, value, and interstate character of the shipments was not an unnecessary gesture, but an essential element of its case, and that had the government not presented such evidence, there would have been grounds for a defense motion that the government had failed to meet its burden of proof (App. A87-A89).[5/]

Defense counsel's statement during summation that the government need not have introduced evidence to establish the theft, value, and interstate nature of the shipments disregarded the government's burden to prove each element of the charged offenses. It is clear that the trial court has an obligation to insure that the jury understands each separate element of the offenses charged, even where certain elements have been wholly uncontested by the defendant. United States v. Natale, 526 F.2d 1160, 1167 (2nd Cir. 1975), cert. den., 425 U.S. 950; United States v. Montiell, 526 F.2d 1008, 1010 (2nd Cir. 1975). It is also certain that the government's burden of proof on each element must be made unmistakeably clear in the court's charge. E.g., Notaro v. United States, 363 F.2d 169, 175 (9th Cir. 1966). Thus the trial court was compelled by these responsibilities to correct defense counsel's erroneous statement with respect to the government's proof, and in so doing the court merely amplified on its earlier instructions in which it explained to the jury the

5/ "App." refers to appellant's appendix.

essential elements of each charged offense and the government's burden as to each element (See, App. A83-A87). Appellant to the contrary, the court's brief comments did not imply that defense counsel was intentionally misleading the jurors or dealing unfairly with them. The court did not emphasize defense counsel's erroneous remarks, but rather focused upon its obligation to provide clear and adequate instructions on the law.

2. During a conference in chambers on the first day of trial, counsel for Norman Oretskin, the owner of Norman's Warehouse and Polar Foods (Tr. 135, 178, 184, 209-210) who had been subpoenaed by the government, informed the court and counsel that Oretskin would invoke his privilege against self-incrimination if called to testify. The court did not release Oretskin from the subpoena. However, the court informed counsel that if the government declined to call Oretskin in these circumstances, it would not instruct the jury that the government's failure to call the witness permitted an inference that the witness' testimony would have been unfavorable to the government (App. A7-A13). The government did not call Oretskin and, as anticipated by the court, defense counsel later asked for a missing witness instruction which the court refused (App. A3). Despite this refusal, defense counsel argued during summation that the government's failure to call Oretskin was a serious deficiency in its case. The argument was

presented in conjunction with counsel's strenuous attack upon the credibility of Rudolph Hektor, an employee of Oretskin, who had unloaded the stolen sugar at Polar Foods and had described the driver of the truck resembling appellant (Tr. 136-139). Counsel noted that Hektor was still employed by Oretskin, who owned the warehouse from which the stolen foodstuffs were distributed. He further argued that only Oretskin knew all of the facts which led to the arrival of the sugar shipment at the warehouse.[6/]

During closing instructions the court noted that defense counsel had suggested in his summation that only Oretskin knew the complete details of the sugar transaction which took place at

6/ Defense counsel argued to the jury as follows (App. A34):

> Norman Oretskin, the owner of Polar Foods, and obviously the center of the disposition point with respect to at least the two loads that were, in fact, delivered, and you know not whether he has been charged, and if he has been charged, what he has been charged with, whether his case is disposed of or if he has a case. You know nothing about Norman Oretskin, yet you are asked to determine the credibility of his right-hand man, Rudy Hektor, without any motivation--Rudy Hektor, who is still employed by Norman Oretskin at this very moment, and you are asked to determine credibility in these issues when the Government falls flat on its face with respect to making what are sensible explanations for deficiencies in our case.

Polar Foods. From this the court concluded that defense counsel "meant to infer that Oretskin wasn't called as a witness...because the Government knew that his testimony would have been unfavorable" (App. A89). The court then explained to the jury that both court and counsel had been informed early in the trial that Oretskin, if called to testify, intended to invoke his privilege against self-incrimination (App. A89-A90). Following this explanation, the court instructed the jury that the government's failure to call Oretskin allowed the jury to presume that his trial testimony would have been unfavorable to the government (App. A90).[7/] Defense counsel objected to the trial court's explanation of Oretskin's Fifth Amendment claim (App. A98-A99).

7/ The trial court instructed the jury as follows (A90):

> Since the prosecution did not call this witness, you may presume that this testimony would have been unfavorable to the prosecution. Now this is in spite of the fact that I told counsel at that conference in chambers...that I would not make such a charge to the jury in view of the fact of those happenings that I have pointed out.

We further note that it is unapparent from appellant's brief that such an instruction favorable to the defense was given. This is attributable to the addition of "bracketed material" to and a change of tense in the above-quoted instruction, as set out in appellant's brief (Br. 11), which wholly changes the import of the court's charge.

If a witness whose testimony would elucidate the issues at trial is peculiarly within the control of one of the parties, that party's failure to call the witness to testify permits an inference that the testimony, if produced, would have been unfavorable to the party. Graves v. United States, 150 U.S. 118, 121 (1893); United States v. Super, 492 F.2d 319, 321-323 (2nd Cir. 1974), cert. den., 419 U.S. 876; United States v. Young, 463 F.2d 934, 939 (D.C. Cir. 1972). Where, as here, the witness invokes his Fifth Amendment privilege, no presumption is allowed since the witness is available to neither side. United States v. Martin, 526 F.2d 485, 487 (10th Cir. 1975); Bowles v. United States, 439 F.2d 536, 541-542 (D.C. Cir. 1970), cert. den., 401 U.S. 995.[8/] Despite Oretskin's announced intention to invoke his constitutional privilege, defense counsel argued during summation, in effect, that Oretskin was not called as a witness because the government knew his testimony would have been unfavorable to their case. In view of the situation engendered by counsel's

8/ The government is not obligated to grant immunity to allow a witness to testify in order to avoid the missing witness instruction. The many considerations which enter into the government's decision to grant immunity indicate that the government's refusal to use this power can not reasonably be equated to the failure of a party to produce a witness peculiarly within its control. Morrison v. United States, 365 F.2d 521, 523-524 (D.C. Cir. 1966).

improper mis[illegible]ng witness argument, the trial court's explanation of Oretskin's Fifth Amendment claim was necessary to supply the jury with the information which it needed to avoid being misled. 9/ Bowles v. United States, supra, 439 F.2d at 541-542; Morrison v. United States, supra, 365 F.2d at 523-524. See United States v. Long, 533 F.2d 505, 509 (9th Cir. 1976). The court did not criticize defense counsel and, in an abundance of caution, followed its explanation by instructing the jury, as requested by defense counsel, that the government's failure to call Oretskin as a witness permitted an inference that his testimony would have been unfavorable to the government. In these circumstances, the court's instruction did not preclude an impartial evaluation of appellant's defense by the jury. Id.

9/ Although the court's purpose might have been achieved had it simply announced Oretskin's unavailability without providing a reason for his absence, appellant's complaint does not turn on the fact that the court explained Oretskin's intent to invoke the Fifth Amendment. Appellant does not contend that the instruction had a disporportionate impact upon the jurors' deliberations because they might infer Oretskin's guilt of some crime from his constitutional claim. Indeed, during summation defense counsel sought to create an inference that Oretskin, not appellant, organized and supervised the sugar theft. Rather, appellant complains that the instruction prejudiced the jury against defense counsel by implying that counsel was not obeying the rules of trial. This alleged prejudice would result, if at all, simply from an instruction that no inference could be drawn from Oretskin's failure to testify, even if the reason for his absence was not revealed. Thus, in the present circumstances, it was immaterial whether the court told the jury that Oretskin's unavailability was due to his claim of the privilege against self-incrimination.

Appellant also contends that the court's announcement of Oretskin's Fifth Amendment claim led the jury to infer that Oretskin's testimony would have been harmful to appellant (Br. 33-36). His argument is premised upon the contention that the court's instruction was "a rebuke to defense counsel," an allegation unsupported by the record. Moreover, his argument completely disregards the court's instruction that the government's failure to call Oretskin as a witness permitted an inference that his testimony would have been unfavorable to the government.

Beyond this, the hazard created by the challenged instruction is that the jury might infer the witness' guilt of some crime from his Fifth Amendment claim. Bowles v. United States, supra, 439 F.2d at 541-542. However, had the jury inferred that Oretskin was involved in the sugar theft, the inference would not have been harmful to appellant's defense. Indeed during summation, defense counsel himself sought to create an inference that Oretskin, not appellant, organized and supervised the sugar theft and then successfully avoided prosecution by inducing his employee, Rudolph Hektor, to implicate appellant in the theft (App. A33-A34). Thus, in this case, an inference of Oretskin's involvement in the sugar theft would have been consistent with the defense theory of the case and would reasonably inure to appellant's benefit.

3. While investigating the thefts charged in the indictment, government agents recorded a conversation between appellant and Lafferty by using a body transmitter worn by Lafferty. Prior to introducing this conversation at trial, the government requested the court to determine if the recording was sufficiently audible to be admitted into evidence. After hearing approximately fifteen minutes of the recording the court concluded that "for all practical purposes, the tape is inaudible" and informed government counsel that the recording would be ruled inadmissible if offered into evidence (Tr. 392-395). Thus, although Lafferty testified about his conversation with appellant, government counsel did not attempt to use the recording at trial. Nevertheless, during closing argument defense counsel called the jury's attention to the government's failure to introduce the recording.[10/]

10/ Defense counsel argued as follows (App. A58-A59):

> [Lafferty] goes wired for sound on March 6th with the State Police, and I told you in the opening that we would show you that they failed--he talked to [appellant] for over an hour, and they failed to incriminate the defendant...and the excuse was that the tape was noisy or something or another.
>
> Well, we had an 18-minute tape--that is silent. Now we have a whole hour and twenty-minute tape that goes noisy. And in fact Lafferty was what he claimed he could be and could do, and what he claimed he could do was a very simple thing to do, to run back and get an un-noisy tape or have him call on the telephone where they didn't have anything that was going to interfere with that. No, but what happened? Nothing happened.

In its closing instructions, the trial court noted that "there was some reference to the fact that there was no evidence of [the Lafferty] tape in this case" (App. A91). Accordingly, it informed the jury that it had listened to the recording, had determined that it was inaudible, and had ruled that the recording was inadmissible.[11] Defense counsel objected to the court's explanation of the audibility hearing and moved for a mistrial. The court denied the motion (App. A99-A100).

Again the trial court's instruction was necessary to correct the false implication in defense counsel's summation that the government had withheld the recording because it would have contradicted Lafferty's testimony about appellant's incriminating statements during the conversation. Appellant's contention that the instruction was unnecessarily critical of defense counsel finds no support in the record. The brief instruction simply

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11/ The court instructed the jury as follows (App. A90-A91):

> Another reference was made to the fact that Lafferty had a body transmitter and had conversations. And there was some reference to the fact that there was no evidence of that tape in this case. That tape was played before me, and I was the one who determined that that tape was inaudible and was not understandable, and I would not permit it in evidence. That is the Court's responsibility, and that happened during the course of this trial, and incidentally, at that hearing the defendant's counsel himself also took the position that the tape was inaudible and not understandable.

informed the jury of the court's legal ruling of which the jury had no knowledge. The instruction prevented the jury from being misled and thus was clearly proper. See Bowles v. United States, supra, 439 F.2d at 541-542; Morrison v. United States, supra, 365 F.2d at 523-524.

II

THE TRIAL COURT'S SUMMARY OF THE EVIDENCE DURING CLOSING INSTRUCTIONS WAS FAIR AND IMPARTIAL

Appellant contends that the trial court's review of the evidence resembled a "Prosecutor's summation" because it failed to refer to the testimony of one defense witness and to inconsistencies allegedly exposed on cross-examination of government witnesses (Br. 31).[12/]

So long as it avoids partisan summary, the trial court may review the evidence and express its opinion on the testimony provided it makes it clear to the jury that all matters of fact are submitted for its determination. Quercia v. United States, 289 U.S. 466, 469; United States v. Natale, supra, 526 F.2d at 1167; United States v. Jacquillon, 469 F.2d 380, 387-388 (5th Cir. 1972), cert. den., 410 U.S. 938; United States v. Dixon, 469 F.2d

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12/ In raising this claim, appellant baldly asserts that "approximately two-thirds" of the court's 27 page charge was improper. Such a claim is plainly unfounded, for although appellant attacks the portions of the charge in which the evidence was marshaled and the improper arguments of defense counsel were corrected, he in no way challenges the propriety of the court's twelve page explanation of the elements of the offenses involved or its six page "boilerplate" (Br. 32) instructions on the law.

940, 942 (D.C. Cir. 1972). The trial court's instructions, when properly viewed in their entirety (see United States v. Park, 421 U.S. 658, 674-675 (1975); Cupp v. Naughten, 414 U.S. 141, 146-147 (1973)), constituted fair comment in this case.

In its jury instructions the trial court reviewed the charges and summarized the applicable statutory sections (App. A76-A87). It explained the government's burden of proof and the reasonable doubt standard (App. A92-A93). With respect to its summary of the evidence, the court repeatedly reminded the jury, especially when relating direct evidence of appellant's involvement in the scheme, that it was simply recounting testimony provided by the Webers and Lafferty (App. A70-A75). And at no time during its marshaling of the evidence did the court intimate its assessment of the witnesses' veracity or the evidence introduced by either side. Moreover, the court balanced its summary of the evidence reminding the jury that appellant had testified and had denied any involvement in the three thefts charged in the indictment (App. A75-A76). The court also noted that several witnesses had testified to appellant's good reputation for honesty and integrity and that this evidence of good character might create a reasonable doubt that appellant had committed the offenses charged (App. A95). The court further instructed the jurors that they were the sole judges of the facts and therefore were not bound by the court's recollection and recital of the evidence, but should apply their own version

of the evidence if it conflicted with the court's summary.[13] Finally, the court explained that the jurors were the sole judges of the witnesses' credibility and that they alone were to decide

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13 / The trial court instructed the jury as follows (App. A91-A92):

> During the course of these instructions, I have given you my version of the evidence in the case, based upon my rough notes made during the trial and upon my recollection of the evidence. I have not attempted to cover all the evidence in the case, but you should consider all the evidence. I want to point out to you that you are not at all bound by my version or my recollection and recital of the evidence. If your version or your recollection of the evidence differs from mine, have no hesitation in rejecting my version. If your version differs from mine, rely upon your own version and upon your own recollection of the evidence.

Later, the court repeated its instruction (App. A93-94):

> You as jurors are the sole judges of the facts in the case. It is the duty of the Court to instruct you what the law is so that you may apply the law to the facts as you find them. You may not invade the province of the Court to determine what the law is, and the Court may not invade the province of the jury as to what the facts are.

the weight, effect and value of the evidence.[14]

In sum, the record shows that the trial court's instructions were scrupulously impartial in that they fairly reviewed the evidence in order to frame the factual issues submitted for the jury's determination. In so doing, the court avoided expressing a personal opinion on the evidence, but explained that the jury was the sole judge of the facts and of the credibility of the witnesses. In these circumstances, the instructions were impartial and proper.

III

THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT WITNESSES' PRIOR INCONSISTENT STATEMENTS MAY BE CONSIDERED FOR IMPEACHMENT PURPOSES

Appellant claims that the trial court committed reversible error when it failed to instruct the jury that the testimony of a

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14/ The court instructed the jury as follows (App. A93, A94):

> You as jurors are the sole judges of the credibility of the witnesses.
>
> * * *
>
> Some of the witnesses in the case have an interest in the outcome of the case; some a direct interest and some an indirect interest. But whether the interest is direct or indirect, it is incumbent upon the jury to determine whether you think the witness has let that interest influence his or her testimony in favor of one side or the other. If so, the testimony should be discounted accordingly. If you conclude that some witnesses have testified falsely and have done so intentionally, you have the right to reject the testimony of that witness entirely, or you can reject that part which you believe to be false and retain the balance. That is entirely up to you.

witness may be impeached by prior inconsistent statements. Although appellant's request for this instruction was tentatively granted (App. A5), appellant complains that the court's closing instructions made no specific reference to prior inconsistent statements. Although it is questionable whether defense counsel made an objection sufficient to alert the trial court to its omission, 15/ it is clear in the context of the case that appellant was not harmed by the court's failure to give this specific instruction.

15/ Following the court's instructions, defense counsel objected as follows to the court's charge with respect to counsel's requested instruction number 16 which related to impeachment by prior inconsistent statements (App. A100-A101):

> MR. BOREANAZ: I respectfully except with respect to my request to charge, which were submitted to Your Honor yesterday.
>
> THE COURT: I ruled on each and every one o them, and it is in the record. They are mar ed.
>
> MR. BOREANAZ: There is nothing in the record now.
>
> THE COURT: Yes, there is. I am making those marks on there as part of the case. That is a filed paper. I ruled on each one of those elements in your presence yesterday, and I marked it in writing, and that will be in evidence in the case.
>
> MR. BOREANAZ: All right. I respectfully except to Your Honor's charge as to 15, 16 and 17, pursuant to my requests. I respectfully except to that.
>
> THE COURT: Exception is noted.
>
> MR. BOREANAZ: That is all I have, Your Honor.

[Footnote cont'd.]

During its instructions, the court told the jurors that they were to determine the credibility of the witnesses and were entitled to disregard all or a portion of the testimony of any witness found to have testified falsely.[16] The court further reminded the jurors that the testimony of appellant's accomplices--the Webers and Lafferty--should be viewed with suspicion and utmost caution.[17] The government submits that these instructions were

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Thus, defense counsel's attempt to put the court on notice of its failure to give his requested instruction on prior inconsistent statements immediately followed his general objection to the Court's refusal to give each of the instructions propounded by the defense. Moreover, by merely referring to the omitted instructions by number, defense counsel's objection contained no specificity as to the subject matter of the instructions not given. In view of the court's earlier approval of the instruction regarding prior inconsistent statements (See, App. A5), there is no reason to doubt that the trial court would have charged the jury on this subject had the defense objection been sufficiently specific to alert the court to its omission. But when the court received only an objection to its "charge as to 15, 16, and 17"--expecially after the court had earlier indicated its refusal to give only three of the 17 instructions proposed by the defense (See, App. A3-A6)--the court had no reason to think that defense counsel was doing more than restating his previous objection to the court's refusal to give three of his proposed instructions.

16/ See footnote 14, supra.

17/ The court instructed the jury as follows (App. A94-A95):

> Now I want to call your attention to one fact. The Webers and Lafferty, by their own testimony, were accomplices of this defendant, by their own testimony, and there is no question about that. They were partners in crime, and, therefore, I want to point out that doesn't make their testimony not receivable in evidence. But having been received in evidence,

[Footnote cont'd.]

sufficient to insure that the jurors would weigh the credibility of Elwood Weber and Lafferty with special care. This is especially so under the instant circumstances where the prior inconsistent statements which defense counsel introduced on cross-examination related only to minor details of the three thefts, not to appellant's direct participation in the scheme.[18/]

I want to point out to you that they were accomplices, and it is up to the jury to determine whether they have a motive in testifying as they did in this case. And "accomplice testimony" should be viewed with suspicion. That means you should be alert to the fact that it is accomplice testimony and should be subjected to the utmost caution in weighing that testimony as to each particular Count.

18/ The alleged inconsistencies in Lafferty's testimony about the third theft related to whether or not the stolen trailers were locked when he and Elwood Weber first saw them (Tr. 553-554); whether following the theft, he and Weber met appellant at a rest area or in a restaurant (Tr. 567, 571-573) and whether this meeting occurred during the first or second time that the trucks were stopped (Tr. 567, 578-579, 581); whether or not Lafferty saw appellant driving ahead when his truck ran out of fuel (Tr. 581-583); whether appellant had instructed him to drive the stolen trucks to highway exit 35 or 36 (Tr. 588-589). The alleged inconsistencies in Elwood Weber's testimony related to whether appellant's instructions concerning the disposal of the first stolen shipment were given before or after the shipment was stolen (Tr. 732-735); whether the first shipment was stolen at midnight or 2:00 a.m. (Tr. 736-738) and whether it was unloaded at 9:00 a.m. or in the afternoon (Tr. 782-787); whether following the second theft, he telephoned appellant 16 or 60 miles from the site of the theft (Tr. 775-776); whether, after the third theft, he was to meet appellant "around" or "east of" Lyons, New York (Tr. 758-764); whether he first attempted to meet appellant after the third theft at highway exit 35 or 36 (Tr. 767-768) and whether or not there is a truck parking area near exit 36 (Tr. 766-767).

Terry Weber was not called before the grand jury (Tr. 311, 312) and was not subjected to impeachment on cross-examination by evidence of prior inconsistent statements made before the grand jury.

In similar fashion, appellant also claims that the trial court improperly refused his request to provide a supplemental instruction on impeachment by prior inconsistent statements during the jury's deliberations. Appellant requested the supplemental instuction after the jury sent the court a written request to examine the grand jury testimony of Elwood Weber and Lafferty (App. A101). Appellant's request was refused and the trial court simply informed the jury that the grand jury testimony which they sought was not in evidence (App. A102-A103).

The extent and character of supplemental instructions are within the trial court's sound discretion. United States v. Braverman, 522 F.2d 218, 224 (7th Cir. 1975), cert. den., 423 U.S. 985; United States v. Cheramie, 520 F.2d 325, 332 (5th Cir. 1975); United States v. Bolden, 514 F.2d 1301, 1308 (D.C. Cir. 1975). Here, the jury did not request an instruction on the use of prior inconsistent statements, nor did it indicate any confusion about its duty to determine the witnesses' credibility. Indeed, their request for the grand jury testimony of Weber and Lafferty indicated that in their effort to determine credibility they were properly examining the witnesses' prior inconsistent statements developed during defense counsel's cross-examination. Moreover, supplemental instructions create a danger that the jury will listen to the instructions with particular interest and will rely more heavily on the supplemental instructions than on any single

portion of the original charge. Bollenbach v. United States, 326 U.S. 607, 612 (1946); United States v. Carter, 491 F.2d 625, 633 (5th Cir. 1974). If, in response to the jury's request for grand jury testimony the court had instructed that a witness' credibility could be impeached by prior inconsistent statements, the instruction, standing alone, might have had a disproportionate effect on the jury's credibility determinations. In these circumstances, the court's refusal to provide a supplemental instruction on impeachment by prior inconsistent statements was not an abuse of the court's discretion. See United States v. Koonce, 485 F.2d 374, 378-379 (8th Cir. 1973).

CONCLUSION

It is therefore respectfully submitted that the conviction of appellant should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing brief for appellee have this day been mailed to John F. Humann, Esquire, 736 Brisbane Building, Buffalo, New York 14203.

Dated: October 26, 1977.

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